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THE CHARADE OF TRADITION-BASED SUBSTANTIVE DUE PROCESS

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ABSTRACT

This article criticizes the Supreme Court's substantive due process standard, by which the Court protects unenumerated constitutional rights only if they are deeply rooted in American history and tradition. The first part of the article objects to the standard by way of internal critique, arguing that it does not serve the principal rationale for its adoption – constraining judicial discretion. The standard fails to constrain judicial discretion for three main reasons. First, the Court has vast discretion in deciding which traditions to take into account. Second, there is substantial discretion in determining how to define the tradition at issue, which can be exploited to advance the predilections of the justices. Finally, even if the Court finds that an asserted liberty interest is supported by "American tradition," it must take the further step of determining whether that interest should receive contemporaneous protection, an inquiry which depends heavily on the type of moral judgment the Court sought to avoid by using the deep roots test. Taken collectively, these points show that the deep roots test does very little to rein in judicial discretion. The second part of this article objects to the standard by way of external critique, arguing that it is at war with principles of personal autonomy, majoritarianism, and normative progress. To avoid these problems, the article proposes that the Court replace the current substantive due process standard with the abstract, aspirational standard articulated by Justice Cardozo in Palko v. Connecticut.

INTRODUCTION

Substantive due process is the most controversial doctrine in constitutional law. Critics argue that when judges strike down legislation on substantive due process grounds, they improperly impose their own moral-political judgments without license from either the text

of the Constitution or its original understanding.[1] Indeed, Justice Black argued that protecting substantive rights under the Due Process Clause encroaches on the legislative province because it "require[s] judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary."[2] This institutional concern has weighed heavily on the mind of the Supreme Court in virtually all of its substantive due process decisions and has served as the source of lively debate in some of the Court's most celebrated—and most decried—cases.[3]

For example, in *Lochner v. New York*,[4] Justice Holmes famously accused the majority of imposing its preference for laissez-faire economics when it invoked the Fourteenth Amendment's Due Process Clause to strike down a New York statute limiting the number of hours bakers could work per week. The majority held that the statute interfered with the freedom of contract.[5] Justice Holmes rejoined: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."[6] In essence, Justice Holmes accused the justices in the majority of importing their own libertarian philosophies into the Due Process Clause.

For decades, the Court used the Fourteenth Amendment to strike down a myriad of Progressive statutes and policies: "It is es-

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[1] *See* Washington v. Glucksberg, 521 U.S. 702, 719–22 (1997); Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring); Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting) ("I cannot believe that the [Fourteenth] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. . . . Of course the words 'due process of law' if taken in their literal meaning have no application to this case . . . .").

[2] Griswold v. Connecticut, 381 U.S. 479, 511–12 (1965) (Black, J., dissenting).

[3] *E.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

[4] Lochner v. New York, 198 U.S. 45 (1905).

[5] *Id.* at 57–60. Notably, *Lochner* was not the first case in which the Court invalidated a law on the ground that it violated the freedom of contract; it had done so previously in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

[6] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

timated that almost 200 state laws were declared unconstitutional as violating the due process clause of the Fourteenth Amendment."[7] However, pressure for change grew, and, in 1937, the Court switched direction. In *West Coast Hotel Co. v. Parrish*,[8] the Court upheld a minimum wage law for women, thereby overruling previous opinions which had held similar statutes unconstitutional under the Due Process Clause for violating the freedom of contract.[9] In response to the claim that the minimum wage statute ran afoul of the freedom of contract, the majority replied: "What is this freedom [of contract]? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[10] The Court made clear that it was going to be much more deferential to legislative judgment on economic matters, and, in so doing, it seemingly interred the laissez-faire and activist principles undergirding *Lochner*.

The central criticism of the *Lochner* era was that "unelected judges were unduly substituting their own values for those of popularly elected legislatures to protect rights that were not expressly stated in the Constitution."[11] In 1963, the Court gave assurances that this aspect of the *Lochner* era was long gone and that the judiciary would not exceed its proper role in such a drastic way again: al-

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[7] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 616 (3d ed. 2006) (citing BENJAMIN WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1942)).

[8] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[9] *See, e.g.*, Morehead v. N.Y. *ex rel*. Tipaldo, 298 U.S. 587 (1936) (striking down law prescribing minimum wage for women on ground that it did not serve a valid police purpose); Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 550–55 (1923) (same).

[10] *Parrish*, 300 U.S. at 391. In 1937, the Court also undid the limits it had placed on Congress's power to regulate activity pursuant to its commerce powers under Article I, section 8. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act and its regulation of the steel industry as a valid exercise of congressional power); *see also* United States v. Darby, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act and its minimum wage requirement under Congress's commerce powers).

[11] CHEMERINSKY, *supra* note 7, at 620.

though "[t]here was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy," that doctrine "has long since been discarded."[12] Nevertheless, in its 1965 decision, *Griswold v. Connecticut*, the Court struck down a Connecticut statute outlawing contraceptive use on the ground that the law violated the right to marital privacy—a right that is not enumerated in the Constitution.[13] The Court claimed not to base its decision on the Due Process Clause, but rather on "penumbras" of certain rights contained in the First, Third, Fourth, Fifth, and Ninth Amendments.[14] More than anything, the Court wanted to avoid the perception that it was using *Lochner*'s gloss on the Fourteenth Amendment:

> Overtones of some arguments suggest that [*Lochner*] should be our guide. But we decline that invitation as we did in [*West Coast Hotel* and *Lee Optical*]. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.[15]

Even so, the Court candidly acknowledged in *Roe v. Wade* that the right to privacy, as recognized in *Griswold*, is derived from the Due Process Clause of the Fourteenth Amendment and is expansive

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[12] Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963).
[13] Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold*, the Court also made clear that two substantive due process cases from the *Lochner* era were still alive and well—*Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (protecting the right of parents to send their children to parochial school) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (protecting the right of parents to teach their children languages other than English). *Id.* at 481–83.
[14] *Id.* at 483–86. Justice Harlan concurred in the judgment but argued that the proper basis for the Court's decision was the Due Process Clause, not "radiations" from certain provisions contained in the Bill of Rights. *Id.* at 500 (Harlan, J., concurring).
[15] *Id.* at 481–82 (majority opinion).

enough to include a "woman's decision whether or not to terminate her pregnancy."[16]

Modern substantive due process jurisprudence has focused on social issues, not so-called "economic liberties." But the concern about judges reading their own values into the Due Process Clause remains.[17] To allay this concern, the Supreme Court has adopted what this article will refer to as the "deep roots" test, the principal purpose of which is to cabin judicial discretion in determining which unenumerated rights deserve a constitutional safeguard.[18]

According to the deep roots test, the Court should protect unenumerated rights only if they are "objectively, deeply rooted in this Nation's history and tradition."[19] The Supreme Court has asserted that this standard provides the "crucial guideposts for responsible decision making" and therefore avoids transforming the liberty protected by the Due Process Clause "into the policy preferences of the . . . Court."[20] The Court has explained that this standard is preferable to other standards—such as Justice Cardozo's, which would strike down laws that infringe on rights that are "implicit in the concept of ordered liberty"[21]—because it prevents judges from etching their personal predilections into the Constitution.[22] For that reason, most circuit courts have adopted the deep roots test as their substantive due process standard, even though the Court did not employ the test in its 2003 decision, *Lawrence v. Texas*.[23] Moreover,

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[16] Roe v. Wade, 410 U.S. 113, 153 (1973).

[17] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

[18] *See* Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997); Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986), *overruled on other grounds by* Lawrence v. Texas, 539 U.S. 558 (2003).

[19] *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks omitted).

[20] *Id.* (internal quotations omitted).

[21] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[22] *See Glucksberg*, 521 U.S. at 722 (stating that the test minimizes the "subjective elements that are necessarily present in due-process judicial review").

[23] *See* Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since* Lawrence v. Texas, 105 MICH. L. REV. 409, 410–13 (2006) (showing that adherence to the deep roots test has continued even though the Court did not employ it in Lawrence v. Texas, 539 U.S. 558 (2003)).

commentators have extolled the test, saying it is "wise, workable, and firmly grounded in principles of American constitutionalism."[24]

This article argues that, despite its broad acceptance, the deep roots test is an unsound method for recognizing fundamental rights. Contrary to the Supreme Court's assurances, the test fails meaningfully to constrain judicial discretion. And to the very limited extent that it does, it is inconsistent with both democratic ideals and the basic principle that rights are checks on public power. In addition, the test has the potential to impede moral progress because it instructs courts to look to tradition to recognize constitutional rights. For these reasons, the Supreme Court should jettison the test.

Part II of this article builds the positive case for the deep roots test, setting forth the principal arguments that have been articulated in its favor. Parts III and IV demonstrate that these arguments do not pass muster when viewed with close scrutiny. Part III provides an immanent criticism of the deep roots test, objecting to it on its own terms. Part IV objects to the deep roots test by way of external critique, arguing that it is in conflict with personal autonomy, majoritarian principles, and normative progress. Part V suggests that Justice Cardozo's standard, which instructs courts to protect rights that are "implicit in the concept of ordered liberty,"[25] would serve as a good alternative to the deep roots test because, although not without flaws of its own, it promotes candor and transparency—which are desperately needed in this muddled area of law. Moreover, it is forward-looking and aspirational, and is thus a more suitable standard for determining which rights the Constitution guarantees.

II. THE POSITIVE CASE FOR THE USE OF TRADITION

In his majority opinion in *Bowers v. Hardwick*, Justice White expressed concern about protecting rights not listed in the Constitution: "The Court is most vulnerable and comes nearest to illegitimacy

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[24] Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 681.
[25] *Palko*, 302 U.S. at 325.

when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[26] To ward off institutional illegitimacy, Justice White insisted that the Court should protect unenumerated rights only if they are deeply rooted in our nation's history and tradition.[27]

In *Washington v. Glucksberg*, the Court argued that the deep roots test is necessary to "direct and restrain [the Court's] exposition of the Due Process Clause."[28] At the same time, it repudiated Justice Souter's substantive due process standard, which would strike down laws amounting to "arbitrary impositions" or "purposeless restraints."[29] The majority asserted that Justice Souter's approach would leave judges with unbridled power to strike down democratically passed statutes on the basis of personal predilection.[30]

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[26] Bowers v. Hardwick, 478 U.S. 186, 194 (1986); *see also Glucksberg*, 521 U.S. at 720 ("[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.") (internal quotation marks omitted).

[27] *See Bowers*, 478 U.S. at 195. Although the majority mentioned Cardozo's standard—which abstractly asks whether an asserted right is "implicit in the concept of ordered liberty"—it is clear that the Court relied on the deep roots test. *See id.* at 194–95; Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 86–87 (2006) ("Justice White [in *Bowers*] also recited the more abstract formulation of *Palko v. Connecticut*, which would protect rights that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. But this alternative formulation appeared to be doing no work at all. Instead, White's analysis for the Court was strictly historical.") (citations and internal quotation marks omitted).

[28] *Glucksberg*, 521 U.S. at 721.

[29] *Id.* at 721–22.

[30] *Id.* ("This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review."). Justice Souter's standard originated from Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). The majority in *Glucksberg* was not entirely fair to Souter. In his concurrence, he did not propose that the Court engage in the purely abstract inquiry of whether a statute seemed "arbitrary" or "unreasonable." Like Harlan, Souter asserted that the analysis should be done with a proper respect for the traditions and conscience of the American people. *Glucksberg*, 521 U.S. at 765–66 (Souter, J., concurring) (arguing that "careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society" are proper (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion))). The key difference between the majority's approach and Souter's is that Souter would use tradition as an important point of reference, whereas, for the majority, tradition was dispositive. *See infra* Part IV.

A number of commentators agree that the deep roots test provides a sufficiently determinate standard. Professor Daniel Conkle has stated:

> [T]he approach of historical tradition provides an objective standard of decision making, and it is a standard that judges are competent to employ on a consistent and principled basis. This standard substantially restricts the Court's discretion, precluding it from recognizing an unenumerated constitutional right—no matter how attractive the Justices otherwise might find it—unless the right can be derived, objectively, from an examination of the Nation's history and traditions. . . . [U]nder the theory of historical tradition, as articulated in *Glucksberg*, the potential for value-laden judicial manipulation is substantially reduced. . . . [Whether a right is deeply rooted] is an objective inquiry . . . that direct[s] and restrain[s] the Court's exposition of the Due Process Clause. The Justices are not left free to roam where unguided speculation may take them.[31]

Another commentator has contended that

> the use of tradition . . . appeal[s] to the Court's need for a sense of impartiality in the application of substantive due process. . . . Reference to tradition does not involve the Court in the ambitious task of developing its own unified theory of political liberty; rather, the initial appeal is to a relatively objective history.[32]

Professor and judge Michael McConnell has argued that, when using the deep roots test, "judges of diametrically opposed opinions on the wisdom or justice of the challenged law should reach the

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[31] Conkle, *supra* note 27, at 92–94 (citations and quotations omitted).
[32] Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1187 (1980).

same legal conclusion, since the conclusion will hinge on objective historical fact rather than on normative judgment."[33]

III. THE INTERNAL CRITIQUE OF THE DEEP ROOTS TEST

This Part argues that the Supreme Court's decisions using the deep roots test demonstrate that the test fails meaningfully to restrain judicial discretion. First, the Court has vast discretion in deciding which traditions to take into account. Second, there is substantial discretion in determining how to define the tradition at issue, which can be exploited to advance the predilections of the justices. Finally, even if the Court finds that an asserted liberty interest is supported by "American tradition," it must take the further step of determining whether that interest *should* receive modern-day protection—an inquiry which depends heavily on the type of moral judgment the Court sought to avoid by using the deep roots test.

A. WHOSE TRADITIONS ARE GERMANE?

Relying on tradition to determine which unenumerated rights deserve constitutional protection necessarily leads to the question: Whose traditions count?[34] Unfortunately, the Supreme Court has been inconsistent in answering this question. In *Roe v. Wade*, for example, the Court referred to ancient history to support its holding that a woman has a right to terminate her pregnancy.[35] The Court asserted that "criminal abortion laws . . . are of relatively recent vintage,"[36] and indicated that "abortion was practiced in Greek times

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[33] McConnell, *supra* note 24, at 672; *see also id.* at 670–71 ("This is an historical rather than a philosophical inquiry. It depends not on what judges believe the scope of liberty *should be*, but on what the American people have treated as protected liberty through our history, either through adoption of constitutional text or through long-standing practice.").

[34] *See* ELY, *supra* note 17, at 60. Justice Frankfurter, for instance, suggested that the traditions of only English-speaking people should be taken into account. *See* Malinski v. New York, 324 U.S. 401, 413 (1945) (Frankfurter, J., concurring).

[35] Roe v. Wade, 410 U.S. 113, 130 (1973).

[36] *Id.* at 129.

as well as in the Roman Era"[37]—often being "'resorted to without scruple.'"[38] Further, the Court noted, most Greek thinkers, including Plato and Aristotle, sanctioned pre-viability abortions.[39] Although the Court did not use the deep roots test as its constitutional standard in *Roe*, it nevertheless appealed to historical attitudes to reinforce its holding that the Due Process Clause protects the right to abortion, and it found ancient attitudes germane to the analysis.

Likewise, in *Bowers v. Hardwick*, the Court used the deep roots test to conclude that the Due Process Clause does not protect a right to "homosexual sodomy."[40] In reaching its conclusion, the Court remarked that proscriptions against sodomy have "ancient roots."[41] Indeed, authority relied on by the Court noted that "Plato believed that homosexuality had to be forbidden because it undermined the important Greek values of masculinity and procreation."[42] The Court thus determined that the moral tradition on which the legislature relied was of ancient origin.[43]

The historical conclusion reached in *Bowers* was called into question by the majority in *Lawrence v. Texas*.[44] Specifically, the Court noted that *Bowers*' claim that anti-sodomy laws have "ancient roots" had been criticized in academic writings.[45] Thus, the

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[37] *Id.* at 130 (citing J. RICCI, THE GENEALOGY OF GYNAECOLOGY 52, 84, 113, 149 (2d ed. 1950)).
[38] *Id.* (citing L. EDELSTEIN, THE HIPPOCRATIC OATH 10 (1943)).
[39] *Id.* at 131 (citing PLATO, THE REPUBLIC bk. v; ARISTOTLE, POLITICS bk. viii).
[40] *See* Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986). This parsimonious characterization of the right at issue was rejected in *Lawrence v. Texas*, 539 U.S. 558 (2003).
[41] *Id.* (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986).
[42] *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986), *cited in Bowers*, 478 U.S. at 192.
[43] *Bowers*, 478 U.S. at 192.
[44] Lawrence v. Texas, 539 U.S. 558 (2003).
[45] *See id.* at 567–68 ("Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: 'Proscriptions against that conduct have ancient roots.' In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*." (quoting *Bowers*, 478 U.S. at 192)).

Lawrence Court noted, the ancient history of homosexual sodomy is not clear cut, and Bowers' unqualified statement that sodomy bans have ancient roots is inaccurate.[46] Note that *Lawrence* did not dispute whether ancient history should be relevant for the purpose of substantive due process analysis; it just pointed out that ancient history was not as unkind to homosexuality as *Bowers* had made it appear.

Given the citations to ancient history in *Roe*, *Bowers*, and *Lawrence*, it stands to reason that in *Washington v. Glucksberg*[47]—when faced with the question of whether the Constitution protects the right to physician-assisted suicide—the Court would have found ancient attitudes relevant to the analysis. Taking its cue from the Supreme Court, the lower court relied largely on ancient attitudes to hold that the Constitution guarantees the right to "determin[e] the time and manner of one's own death."[48] As the Ninth Circuit stated: "In Greek and Roman times, far from being universally prohibited, suicide was often considered commendable in literature, mythology, and practice."[49]

The lower court noted that ancient Greek attitudes provide support for the right to suicide. For example, Oedipus's mother, Jocasta, was made to appear praiseworthy when she committed suicide after learning of her incestuous—albeit unintentional—relationship with her son.[50] Sophocles portrayed suicide as an honorable way for her to exit a woeful situation. In addition, Plato argued that suicide could at times be justified, such as when one has a painful, terminal illness.[51] In the Athenian polis, magistrates kept a

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[46] *See id.*

[47] Washington v. Glucksberg, 521 U.S. 702 (1997).

[48] *See* Compassion in Dying v. Washington, 79 F.3d 790, 793 (9th Cir. 1996); *see also id.* at 806 ("Like the [Supreme] Court in *Roe*, we begin with ancient attitudes.").

[49] *Id.*

[50] *Id.*; *see also* SOPHOCLES, OEDIPUS THE KING 80–81 (Stephen Berg & Diskin Clay trans., 1978) (c. 429 B.C.E.). The court also pointed out that Homer's poetry suggested that he believed that suicide was often heroic. *Compassion in Dying*, 79 F.3d at 806–07.

[51] *Compassion in Dying*, 79 F.3d at 807. Further, although Socrates counseled his disciples against committing suicide, he willingly drank the hemlock after being condemned to death by the Athenian jury, and others followed his lead. *Id.*

supply of hemlock for those who wished to end their lives. Ancient Greek law provided:

> Whoever no longer wishes to live shall state his reasons to the Senate, and after having received permission, shall abandon life. If your existence is hateful to you, die; if you are overwhelmed by fate, drink the hemlock. If you are bowed with grief, abandon life. Let the unhappy man recount his misfortune, let the magistrate supply him with a remedy, and his wretchedness will come to an end.[52]

Furthermore, the Romans often glorified suicide as an act of rational will. Cato, who committed suicide to avoid dishonor when Caesar crushed his military aspirations, was greatly admired. Montaigne wrote: "[Cato was] chosen by nature to show the heights which can be attained by human steadfastness and constancy. . . . Such courage is above philosophy."[53] Additionally, the ancient Scythians believed suicide was the honorable way to die when one became too weak to continue living nomadically.[54] And in the Old Testament, four suicides are mentioned—that of Samson, Saul, Abimelech, and Achiophel—and not one is condemned.[55] Finally, in the New Testament, Judas Iscariot's suicide is not considered to be a further sin, but an act of atonement.[56]

The point of this history lesson is to show that ancient attitudes provide considerable support for the right to determine the time and manner of one's death. However, on appeal from the Ninth Circuit, the Supreme Court altogether *ignored* this wealth of ancient

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[52] *Id.* (citing EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 330 (John A. Spaulding & George Simpson trans., 1951)).
[53] *Id.*
[54] *Id.* at 807 n.24. In addition, "[h]undreds of Jews killed themselves at Masada in order to avoid being captured by Roman legions. . . . [Furthermore, t]he Vikings believed that the next greatest honor, after death in battle, was death by suicide." *Id.* (citing Thomas J. Marzen et al., *Suicide: A Constitutional Right*, 24 DUQ. L. REV. 1, 14–17 (1985)).
[55] *See id.* at 808 n.25.
[56] *Id.*

history. Instead, the Court began its historical inquiry by citing commentators from the thirteenth century[57]—who wrote well after St. Augustine had convinced Christendom that suicide is a sin under the Fifth Commandment's[58] injunction, "Thou shalt not kill."[59] Indeed, Augustine's proclamation that "Christians have no authority for committing suicide in any circumstances whatever" was gradually integrated into Christian thought by his successor, St. Thomas Aquinas.[60]

Whereas the ancients were largely tolerant of suicide,[61] St. Augustine's interpretation of the Fifth Commandment dramatically changed the way European societies viewed the matter. Indeed, "[t]he Christian position was determined once and for all by Saint Augustine, an uncompromising foe of suicide."[62] After Augustine, suicide would be a sin—as reflected in Dante's early fourteenth century work the *Divine Comedy*, where the souls of "the suicides" are eternally assigned to the Seventh Circle of lower Hell.[63] Having begun its historical inquiry with thirteenth century thought, it is no wonder that the Court held that the right to physician-assisted suicide is not deeply rooted in history and tradition.

The present discussion illustrates that the deep roots test is indeterminate because it leaves judges free to choose which traditions

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[57] Washington v. Glucksberg, 521 U.S. 702, 710 (1997).

[58] The Roman Catholic and Lutheran churches use a slightly different numbering of the commandments than do certain other Judeo-Christian traditions, which number this the Sixth Commandment. *See generally* Moshe Greenberg, *The Decalogue Tradition Critically Reexamined*, *in* THE TEN COMMANDMENTS IN HISTORY AND TRADITION 83, 96 (Gershon Levi ed., Moshav Shorashim trans., Hebrew University Press 1990) (1985).

[59] *See* Georgia Noon, *On Suicide*, 39 J. HIST. IDEAS 371, 375 (1978). Augustine argued that suicide violates the Fifth Commandment because the prohibition against killing applies to self-killing and the killing of others. *Id.* Augustine reasoned that because the Fifth Commandment did not include the phrase "thy neighbor," it applied equally to self-killing and homicide. *Id.*

[60] *See id.* (quoting AUGUSTINE, 1 THE CITY OF GOD 142)

[61] *Id.* at 372–74. A notable exception was Aristotle, who was opposed to suicide. *Id.* at 373.

[62] Lester G. Crocker, *The Discussion of Suicide in the Eighteenth Century*, 13 J. HIST. IDEAS 47, 49 (1952).

[63] Noon, *supra* note 59 at 376; *see also* DANTE ALIGHIERI, INFERNO, 123–31 (Elio Zapulla trans., Pantheon Books 1998) (1472).

to take into account.[64] While the test directs courts to appeal to "our Nation's history," it is entirely unclear where that begins and where it ends. This malleability leaves judges free to cherry-pick from history to reach their preferred results. Any disinterested commentator would confirm that historical attitudes on suicide have ranged from approval to condemnation.[65] Thus, the deep roots test provides no clear answer as to whether the right at issue in *Glucksberg* is deeply rooted in history and tradition. The Supreme Court was able to conclude that the right does not deserve constitutional protection only by pretending that history generated a clear answer, when in fact it did not.

It is common for there to be historical attitudes and practices that support each side of a constitutional controversy.[66] This leaves courts with the ability to rule in either party's favor by emphasizing the supportive history and either ignoring or downplaying the unsupportive history. It is troubling that the deep roots test allows for such vast discretion, considering that the principal reason for its adoption was to provide a determinate criterion for establishing which unenumerated rights are constitutionally protected.

B. CHARACTERIZING THE RELEVANT TRADITION

1. How Broadly or Narrowly Should the Tradition Be Defined?

Courts retain a vast degree of discretion in deciding how narrowly or broadly to define the tradition at issue in a particular case.[67] How they choose to exercise that discretion can profoundly affect their resolution of a case. If the tradition is described narrowly, it is

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[64] *See* Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting) (arguing that it is a mistake to believe that a "search for 'tradition' involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history").

[65] For an excellent historical summary that illustrates that attitudes on suicide have fluctuated throughout Western history, see Noon, *supra* note 59.

[66] *See* ELY, *supra* note 17, at 60–62.

[67] *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 98 (1991) ("[T]here is no universal metric of specificity against which to measure an asserted right.").

likely that the legislation under review will be deemed consistent with it, thereby leading the court to uphold the statute.[68] However, if the tradition is defined more broadly, judges can more readily appeal to it to strike down statutes they deem contrary to it.[69]

Consider *Michael H. v. Gerald D.*[70] In that case, the Court was called upon to assess the validity of a California statute, which provided that a child born to a married woman was conclusively presumed to be a child of the marriage. This law adversely affected visitation rights of biological fathers in cases where a child was conceived during an extramarital affair. Justice Scalia's plurality opinion concluded that the historic sanctity accorded to the unitary family would deny the right of "a natural father" to visit a child who was "adulterously conceived."[71] By contrast, Justice Brennan argued that the right of a father to visit his child, even if the child was conceived out of wedlock, fell under the historic respect for the parent-child relationship.[72]

Unfortunately, there is no *a priori* way of determining who has the better claim here, as "there are many different ways of describing a liberty, and many different ways of characterizing a tradition."[73] In *Washington v. Glucksberg*, the Court stated that traditions should be "carefully" described.[74] But this seems eminently unhelpful. Most assuredly, both Justices Scalia and Brennan would insist that they were "careful" in characterizing the tradition at issue in *Michael H.* Without an objective yardstick by which to determine how a tradition should be described, the discretion inherent in describing traditions will remain.[75]

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[68] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 924 (5th ed. 2005).
[69] *Id.*
[70] Michael H. v. Gerald D., 491 U.S. 110 (1989).
[71] *Id.* at 127 n.6. Justices O'Connor and Kennedy joined the plurality in all but this footnote. *Id.* at 132.
[72] *Id.* at 139–40 (Brennan, J., dissenting).
[73] J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615 (1990); *see also* TRIBE & DORF, *supra* note 67, at 98–101.
[74] Washington v. Glucksberg, 521 U.S. 702, 722 (1997) ("[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases.").
[75] *See* TRIBE & DORF, *supra* note 67, at 98.

Were the Court to adopt Justice Scalia's method of formulating traditions, some of the indeterminacy of the deep roots test would be cured.[76] To prevent "arbitrary decisionmaking," Justice Scalia prescribes that judges should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[77] This approach has intuitive appeal. For example, suppose a mother gives her daughter two rules: 1) you are not to eat candy at night; and 2) you are permitted to eat food when you feel hungry. In light of the mother's first rule, it would be manipulative for the child to appeal to the second rule to claim that she is allowed to eat candy at night.[78] Justice Scalia would extend this logic to substantive-due-process decision making.

Unfortunately, the substantive due process framework does not admit such an easy solution. Although it may be important for judicial discretion to be constrained, it is equally if not more important that decisions be morally defensible. To that end, it is often necessary to reexamine our specific traditions in light of our broader constitutional commitments.[79] For example, America once had a tradition of slavery. At the same time, we purported to value human freedom and equality.[80] To catalyze much-needed change, abolitionists such as Fredrick Douglass were right to challenge the establishment by insisting that its specific tradition of slavery was incompatible with its broader commitments to freedom and equality.[81] The same can be said of the suffragists: society's treatment of women needed to be brought into harmony with its commitment to equality.

In the substantive due process milieu, the majority in *Bowers v. Hardwick* appealed to our nation's (supposed) specific tradition

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[76] The Court has declined to adopt Justice Scalia's methodology. *See Glucksberg*, 521 U.S. at 722.

[77] *Michael H.*, 491 U.S. at 127 n.6 (1989).

[78] I am indebted to Professor Louis Michael Seidman for this example.

[79] This point was also developed during a discussion with Professor Seidman.

[80] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("all men are created equal").

[81] Fredrick Douglass, The Dred Scott Decision: Speech Delivered at the Anniversary of the American Abolition Society, New York (May 14, 1857), *in* TWO SPEECHES BY FREDERICK DOUGLASS 27 (1857).

against "homosexual sodomy" to uphold a law proscribing the practice.[82] However, in *Lawrence v. Texas*, the Court recognized that the specific tradition referenced in *Bowers* needed to be reconsidered in light of our broad commitments to human equality, dignity, and autonomy.[83] Indeed, "[t]ime has taught us that much of what we once 'knew' about gay people was wrong, just as time taught us that immemorial 'truths' about women, Asians, black and brown people, the Irish, Italians, and Jews, and others were not true."[84] Because the specific tradition undergirding *Bowers* did violence to our broad commitments to freedom and equality, the Court set it aside.

At times, our broad commitments will demand that we set aside our specific traditions in order to prevent the Constitution from becoming "a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[85] Although more determinate than the one currently employed, Justice Scalia's method of characterizing traditions—which would unflinchingly enforce specific traditions over general ones—cannot be defended in those situations where our specific traditions are in need of reexamination. Normative defensibility is too large a price to pay for a small step towards determinacy.[86]

2. Choosing Between Restrictive and Permissive Traditions

The tradition-characterization problem is compounded by the fact that in many cases there are permissive and restrictive traditions that cut in opposite directions.[87] For example, in *Cruzan v. Director,*

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[82] Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986).
[83] Lawrence v. Texas, 539 U.S. 558, 567 (2003).
[84] Matthew Coles, Lawrence v. Texas *& the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 48 (2005).
[85] Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting).
[86] Even if the Court were to adopt Justice Scalia's method, discretion in picking which traditions to use would remain. *See supra* Part III.A.
[87] Louis Michael Seidman, *Confusion at the Border:* Cruzan*, "The Right to Die," and the Public/Private Distinction*, 1991 SUP. CT. REV. 47, 68–70.

Missouri Department of Health,[88] the Court was presented with the question of whether an adult has the right to refuse medical treatment when doing so would result in death. For the purpose of the analysis, the Court was faced with two traditions—one permissive and one restrictive—which were in opposition to each other. Although there was a tradition permitting the state to regulate suicide, there was also a "tradition restricting state interference with private decisions to refuse medical treatment."[89] The Court chose to give tentative primacy to the restrictive tradition by assuming that there is a right to refuse medical treatment even when doing so will result in death.[90] However, nothing in the deep roots test dictated that result. It would have been equally consistent with the deep roots test for the Court to give primacy to the permissive tradition.[91]

To resolve this indeterminacy, Justice Scalia's writings suggest that he thinks permissive traditions should trump restrictive ones.[92] Applying his principle to *Cruzan*, Justice Scalia might argue that "because the state has traditionally been permitted to regulate suicide, there cannot be a constitutional right to refuse lifesaving medical treatment" when doing so would result in death.[93] But this only begs the question at issue. As Professor Seidman has illustrated:

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[88] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990). Relying principally on the common law notion that unwanted touching was a battery, the Court "assumed" that there was a right to refuse unwanted medical treatment. *Id.*

[89] Seidman, *supra* note 87, at 69.

[90] *Cruzan*, 497 U.S. at 287 (O'Connor, J., concurring) ("[A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

[91] Indeed, the deep roots test merely prescribes that the Court should only protect rights that are objectively, deeply rooted in our nation's history and traditions. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[92] *See* Burnham v. Superior Court, 495 U.S. 604, 618–19 (1990) (plurality opinion); Rutan v. Republican Party of Ill., 497 U.S. 62, 93–95 (1990) (Scalia, J., dissenting); Seidman, *supra* note 87, at 70. In situations where restrictive traditions are more specific than permissive ones, this principle would conflict with Scalia's statement in *Michael H.* that specific traditions should trump general ones. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). But it is not the purpose of this article to expose the contradictions of Justice Scalia's jurisprudence; I will thus address each rule on its own terms.

[93] Seidman, *supra* note 87, at 68–70.

> Justice Scalia never explains why permissive traditions are favored over restrictive traditions. This preference amounts to a privileging of the domain of collective public policy over the domain of private individual rights. We are still left with the need to explain or justify the decision to place the decision in one sphere rather than the other.[94]

Although Justice Scalia's rule may inject a degree of determinacy into the analysis, it would do so without any justification. The fact that a given rule constrains discretion is not enough to justify it. After all, a rule that instructed judges to protect any liberty interest asserted by someone under the age of thirty-five is plenty definite, yet it would be wholly arbitrary. Similarly, Justice Scalia's preference for permissive traditions over restrictive ones is arbitrary because it assumes, without justification, that public power should trump individual decision making when the two conflict. So far, no one has come forth with a workable method of choosing between restrictive and permissive traditions, though many have tried.

Overall, courts have a great deal of discretion in deciding how to define the tradition at issue in a particular case. They may define it with varying degrees of specificity, and they often have the ability to choose between permissive or restrictive traditions. As demonstrated by *Michael H.*, the choices the justices make at this stage of the analysis are often dispositive. Because the deep roots test does not tell courts how to characterize traditions or how to choose between restrictive and permissive traditions, its ability to constrain judicial discretion is illusory.

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[94] *Id.* at 70.

C. SHOULD THE COURT RECOGNIZE THE RIGHT ONCE IT IS DEEMED TO BE SUPPORTED BY HISTORY?

"[R]unning men out of town on a rail is at least as much an American tradition as declaring unalienable rights."[95]

–Garry Wills

Under the deep roots test, even if an asserted right is purportedly supported by our nation's history and traditions, courts must still determine whether the right should be given contemporaneous protection[96]—a determination which hinges on precisely the kinds of normative judgments the Court sought to avoid by using the deep roots test. Thus, being deeply rooted is a necessary, but not sufficient, condition for an asserted liberty interest to receive constitutional protection.[97]

Suppose, for example, a man were to claim that he has a constitutional right to have sexual intercourse with his wife forcibly and against her will, and that prosecuting him for rape is therefore unconstitutional.[98] Is a man's "right" to have forcible, non-consensual intercourse with his wife "objectively, deeply rooted in this Nation's history and tradition"?[99]

Unfortunately, the asserted liberty interest finds a fair amount of support in our nation's history and traditions. At common law, it was not possible for a man to commit the offense of rape on his spouse.[100] Lord Matthew Hale wrote: "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by

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[95] GARY WILLS, INVENTING AMERICA at xiii (1978) (citing "the late political scientist Wilmoore Kendall"), *cited in* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 60 (1980).

[96] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 542 (1977) (White, J., dissenting); Conkle, *supra* note 27, at 94 ("And even if a tradition is 'deeply rooted,' there is the further, nonhistorical and normative question that Justice White suggested in *Moore*: is this a tradition that warrants contemporary constitutional protection?"). *But see* McConnell, *supra* note 24, at 691–98 (arguing that the deep roots test largely eliminates the need for independent normative judgments on the part of the Court).

[97] *See* Conkle, *supra* note 27, at 94.

[98] *Cf.* In re Estate of Peters, 765 A.2d 468 (Vt. 2000).

[99] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quotations omitted).

[100] *See generally* Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306 (1977).

their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract . . . ."[101] Hale's pronouncement was widely followed in the United States.[102] In fact, until very recently, "the courts were nearly unanimous in their view that a husband could not be convicted of rape . . . upon his wife."[103] Some scholars have attributed this rule to the (thoroughly) outdated notion that a woman is her husband's chattel.[104] Today, Lord Hale's rule remains in place in a surprising number of states.[105]

The man in our hypothetical case would indeed have historical support for his claim that the right to have forcible intercourse with one's wife is deeply rooted in our nation's history and tradition. Even if that showing had been made, however, it is clear that any modern court would refuse to accord constitutional protection to the man's asserted liberty interest.[106] But to deny the man's claim, a judge would have to consult something other than the deep roots test, which simply does not provide the tools necessary to make the decision.[107]

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[101] Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1255–56 (1986) ("The marital rape exemption originated at common law in the Seventeenth Century with Lord Mathew Hale's declaration . . . .").

[102] *See* State v. Ward, 28 S.E.2d 785, 787 (S.C. 1944); Commonwealth v. Landis, 112 S.W. 581, 582 (Ky. 1908); Garner v. State, 84 S.W. 623 (Ark. 1905); Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489, 490 (1857); MODEL PENAL CODE § 207.4 Comment (Tentative Draft 4 1953).

[103] Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R.4th 105, § 2[a] (1983) (footnote omitted); *see* State v. Smith, 426 A.2d 38, 41–45 (N.J. 1981) (discussing the spousal rape exemption and its origins and concluding that a man could be charged with raping his *estranged* wife, notwithstanding Hale's pronouncement).

[104] *See* Note, *supra* note 100, at 307–12.

[105] *See id.* at 308.

[106] In fact, the husband in *In re Estate of Peters*, 765 A.2d 468 (Vt. 2000) argued that, under the marital rape exemption, he could not be sued for sexual battery and rape of his wife. However, the court "reject[ed] entirely the notion that marriage creates any kind of implied 'blanket consent to sexual contact.'" *Id.* at 474.

[107] Notably, some states have struck down the "marital exemption" on Equal Protection grounds. *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) is the leading case on the matter. Applying the rational basis test, *Liberta* invalidated the exemption, finding that it irrationally denied police protection to married women which it guaranteed to

The foregoing discussion shows that the deep roots test does not meaningfully diminish the need for normative decision making—as the Court had hoped it would.[108] To sum up, the deep roots test does a poor job of eliminating moral-political judgments from the substantive due process framework because judges are free to "cherry-pick" from history to support their preconceived opinions; judges have discretion in characterizing the relevant tradition; and, even if a court determines that an asserted right is supported by history and tradition, it must still engage in the value-laden endeavor of determining whether the right *should* be given contemporaneous protection—a step in the analysis that the Court has not yet acknowledged but which is critical to prevent the inquiry from becoming absurd.

Taken collectively, these points demonstrate that the deep roots test has the ability to "prove almost anything to those who are predisposed to have it proved."[109] The medicine the Court prescribed to cure the subjectivity of substantive-due-process decision making turns out to have been a placebo.

IV. THE EXTERNAL CRITIQUE OF THE DEEP ROOTS TEST

Assuming *arguendo* that the deep roots test did constrain discretion, it would still be flawed for two important reasons. First, determining which rights the Constitution protects by reference to tradition amounts to defining individual rights on the basis of the collective will, which is antithetical to the principle that rights are

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unmarried women. *Id.* at 573. Several states have followed suit. *See* Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986); People v. M.D., 595 N.E.2d 702 (Ill. App. Ct. 1992). *But see, e.g.*, People v. Brown, 632 P.2d 1025 (Colo. 1981) (upholding marital exemption in sexual assault statute). The court in *Brown* held that the exemption was valid given the state's interest in encouraging and preserving marital relationships. *Id.* at 1027. However, rather than providing an incentive for women to get married, the exemption creates a clear disincentive, considering the substantial police protection a woman relinquishes when she does so. Women who live in a jurisdiction with the exemption may think twice before getting married.

[108] *See* Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997).

[109] ELY, *supra* note 17, at 60.

trumps on the public power.[110] However, because the deep roots test relies on the traditions of generations past, it also fails to promote democratic decision making. Democracy—being closely tied to utilitarian ethics[111]—is about expressing the will of the *living* majority. Thus, the deep roots test lacks meaningful support from our most fundamental, yet often conflicting, constitutional commitments—majoritarian decision making and individual liberty. Second, because the deep roots test instructs judges to rely on tradition to recognize constitutional rights, it has a tendency to thwart moral progress.

A. THE DEEP ROOTS TEST IMPROPERLY DEFINES RIGHTS IN TERMS OF COLLECTIVE POWER

It is a basic principle of constitutional law that rights operate as checks on the collective power.[112] The "tyranny of the majority" is a problem that has long been recognized in political thought.[113] Plato famously asserted that democracy passes into despotism.[114] Under our constitutional framework, rights prevent the majority from intruding into the zone of self-sovereignty and personal choice.[115] This is especially important in a pluralistic society such as ours where, although there may be a dominant culture, there are many different groups and individuals whose views vary widely from

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[110] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi, 297–98, 363–68 (1977).
[111] Jonathan Riley, *Utilitarian Ethics and Democratic Government*, 100 ETHICS 335, 335–36 (1990) (describing many theorists' arguments that democracy and utilitarianism are intimately connected); John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 407 (1978) ("[D]emocracy is a sort of applied utilitarianism.").
[112] *See* DWORKIN, *supra* note 110, at 297–98, 363–68.
[113] *See generally* PLATO, THE REPUBLIC (Benjamin Jowett trans., 1991) (c. 360 B.C.E.). *But see* JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT, WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY 53 (Roger D. Masters ed. & trans., Judith R. Masters trans., 1978) (1762) ("Each of us puts his person and all his power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole.").
[114] *See* PLATO, *supra* note 113, bk. vii, at 318.
[115] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) ("Majority tyranny occurs if legislation invades the areas properly left to individual freedom.").

those of the dominant group.[116] The ability of individuals to refuse to conform to the beliefs and customs of the hegemonic group is essential to the American notion of individual liberty.[117]

However, relying on tradition to give content to substantive due process theory contravenes the basic precept that rights are checks on the collective power. After all, "traditions" and "historical attitudes" are nothing more than the prevailing orthodoxies of past generations.[118] Webster's Dictionary defines "tradition" as "[a] mode of thought or behavior passed from one generation to the other."[119] Thus, for a mode of behavior to qualify as a "tradition," it must have been widely followed; a truly eccentric belief or habit is not a "tradition."[120] Determining which rights are constitutionally protected on the basis of "tradition" therefore amounts to improperly defining rights in terms of collective power. As Justice Brennan argued in his *Michael H.* dissent:

> The plurality's interpretive method . . . ignores the good reasons for limiting the role of "tradition" in interpreting the Constitution's deliberately capacious language. . . . In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, . . . the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies. . . . In a community such as

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[116] *See* John C. Toro, Note, *Why Principles of Federalism and Communitarianism Demand That Tort Law Be Left Up to the States*, 7 GEO. J.L. & PUB. POL'Y (forthcoming May 2009) (pointing out that America differs along regional and cultural dimensions more than it ever has).

[117] *See* Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) ("In a community such as ours, 'liberty' must include the freedom not to conform."); Bork, *supra* note 115, at 2–3; *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 136 (1977).

[118] *See* ELY, *supra* note 17, at 62.

[119] WEBSTER'S II NEW COLLEGE DICTIONARY 1196 (3d ed. 2003).

[120] *See id*.

> ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.[121]

Several commentators have argued that, in light of the deep roots test's collective element, the test vindicates democratic values and can therefore be justified in terms of popular sovereignty.[122] But this is a mistaken judgment, for rule by *yesterday's* majorities is not democracy at all.[123] To quote Thomas Jefferson: "[T]he earth belongs in usufruct to the living; . . . the dead have neither powers nor rights over it."[124] To govern according to the regnant beliefs of yesterday—as the deep roots test prescribes—is more akin to ancestor worship than it is to democracy.[125] Democracy is about *self*-government. And when the Supreme Court limits what living majorities can do based on what was done or held to be true in the past, it substantially curtails the

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[121] *Michael H.*, 491 U.S. at 140–41 (Brennan, J., dissenting); *see also* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."); ELY, *supra* note 17, at 62; *The Supreme Court, 1976 Term, supra* note 117, at 136 ("If the Constitution protects only interests which comport with traditional values, the persons most likely to be penalized for their way of life will be those least likely to receive judicial protection.").

[122] *E.g.*, McConnell, *supra* note 24, at 682–87 (arguing that tradition-based decisionmaking is democratic because it reflects longstanding societal consensuses); Conkle, *supra* note 27, at 92 ("[T]he theory of historical tradition is in relative harmony with the principle of majoritarian self-government because it protects liberties that, over time, have been recognized, approved, and maintained by the American people and by their elected representatives.").

[123] *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009) (discussing the "dead hand problem"); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1719 (2003) ("It is, in fact, hard for anyone who believes in self-government to come up with an explanation for why long-ago generations should have such a decided effect on our law today, whether they are the generation of the Founding, or the Civil War, or any other.").

[124] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) (internal quotation marks omitted), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd ed., 1958).

[125] Strauss, *supra* note 123, at 1719.

ability of the populace to self-govern. Therefore, the deep roots test is at war with both democratic ideals and the basic principle that rights are checks on the collective power.[126]

B. THE DEEP ROOTS TEST THWARTS MORAL PROGRESS

"The tradition of all the dead generations weighs like a nightmare on the brain of the living."[127]

–Karl Marx

The deep roots test impedes society's moral progress. On the one hand, when the Court uses tradition to deny constitutional protection to an asserted liberty interest, there is a danger of uncritically perpetuating the prejudices of past generations.[128] The *Bowers* Court made this mistake when it summarily denied the right of homosexuals to engage in sexual activity solely because past generations had disapproved of it.[129] The Court did not pause to examine whether the historical disapproval was justified.[130] Giving blind deference to our ancestors is no way to decide constitutional cases. Justice Kennedy was spot-on in *Lawrence* when he reminded his colleagues that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[131]

By the same token, the deep roots test can thwart moral progress even when courts use it to recognize new constitutional rights.

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[126] ELY, *supra* note 17, at 62 (1980).

[127] KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 13 (C.P. Dutt ed., 1957).

[128] The Court is more cognizant of this problem in its Eighth Amendment jurisprudence, where the guiding standard is that punishment should be declared unconstitutional if it contravenes "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

[129] To be sure, the *Bowers* majority did recite the "implicit in the concept of ordered liberty" standard. However, it is clear that this alternative formulation did no work and that the Court's analysis was strictly historical. Conkle, *supra* note 27, at 86–87.

[130] *See* Bowers v. Hardwick, 478 U.S. 186, 192–96 (1986); Conkle, *supra* note 27, at 87.

[131] Lawrence v. Texas, 539 U.S. 558, 579 (2003).

Consider *In re Estate of Peters*, where a husband claimed that he could not be held liable for rape and sexual battery on his wife because of the common law's marital rape exemption.[132] Using a standard other than the deep roots test, the Supreme Court of Vermont forcefully rejected the notion that marriage gives a husband "blanket consent to sexual contact."[133] Suppose, however, the court had gone the other way, holding that the spousal rape exemption afforded a husband a constitutional right to have forcible intercourse with his wife.[134] In this hypothetical situation, the court has trammeled normative progress by limiting the activity of the democratic branches based on the untenable opinions of the past.

It is a tragic part of history that men used to have the right to force their wives to have sex. It was traceable to both Lord Hale's assertion that a woman impliedly consents to have sex with her husband by marrying him and to Blackstone's notion that a woman is her husband's property.[135] Neither Hale's nor Blackstone's rationale has a place in modern society. We have come to understand that women deserve respect, bodily integrity, and sexual autonomy. Why should the legislature be shackled to the unjust opinions of history? Rather than uncritically accepting the opinions of the past—however misguided they may be—we would do well to focus our energies on reexamining and striving to better them.[136]

This is not to say that courts should engage in substantive due process analysis totally unmoored from history. It is perfectly acceptable to refer to history as a starting point[137] and to afford a weak

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[132] In re Estate of Peters, 765 A.2d 468, 474 (Vt. 2000).

[133] *Id.*

[134] *Cf.* People v. Flowers, 644 P.2d 916 (Colo. 1982) (rejecting equal protection challenge to marital rape exemption).

[135] People v. Liberta, 474 N.E.2d 567, 572–73 (N.Y. 1984); *see also supra* text accompanying notes 100–105.

[136] *Cf.* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1–5 (1987).

[137] Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("'History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

presumption in favor of practices that conform to tradition.[138] Edmund Burke was right in maintaining that change is not always progress and that reformers who act hastily often neglect the unintended consequences of the changes they propose.[139] Thus, it is advisable for courts to proceed with caution when they are petitioned to abolish a long-established practice in the name of progress. Stability in government is an important value.[140] A weak presumption favoring tradition ensures that reform is not done whimsically and at the same time enables normative development—which tradition-based decision making tends to damper.

Instead of a mild presumption, the Supreme Court's cases using the deep roots test reveal a *conclusive* presumption in favor of tradition. Indeed, in *Bowers* and *Glucksberg*, once the Court determined that the asserted liberty interests were not firmly rooted in tradition, that was the end of the matter, and the interests were denied constitutional protection.[141] This is the kind of reasoning

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[138] *Cf.* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (explaining that due process cannot be "reduced to any formula" but should include consideration of tradition); Washington v. Glucksberg, 521 U.S. 702, 765–66 (1997) (Souter, J., concurring); Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history and solid recognition of the basic values that underlie our society.") (quotations omitted); *see* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes.").

[139] *See generally* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1791). Burke would be much more deferential to tradition than I would, however, as he maintained that traditions reflect the accumulated wisdom of the ages. Thus, for him, though reform was not necessarily bad—as long as compelling reasons existed—it should occur at a glacial pace. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 369–70 (2006) (discussing Burke's position). I do not share Burke's romantic view that traditions necessarily represent ancestral sagacity. Many traditions came into existence as a result of unjust power differentials, collective action problems, and historical accident. *Id.* at 371. Are we to believe, for example, that bans on interracial marriage—which certainly have historical support—were based on accumulated wisdom? What of the traditional right of men to have forcible sex with their wives? Because some traditions were followed—not because they were wise—but out of habit and inattention, I accord much less deference to tradition than Burke.

[140] Sunstein, *supra* note 139, at 369–70.

[141] Washington v. Glucksberg, 521 U.S. 702, 723–29 (1997); Bowers v. Hardwick, 478 U.S. 186, 192–96 (1986).

that obstructs moral progress. If, for example, the Court had followed this unsound approach in other cases, states may still be able to criminalize miscegenation,[142] contraception,[143] and abortion.[144] Blind obedience to tradition is antithetical to the tenor of the Constitution, the language of which was intentionally left open-textured to allow future generations to determine its meaning for themselves.[145] That the framers envisaged this type of organic growth is reflected in *The Federalist No. 14*:

> Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times . . . they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?[146]

In light of the foregoing, the deep roots test is profoundly flawed, and should be set aside. The next Part discusses Justice Cardozo's alternative standard and suggests that it is a good replacement for the deep roots test.

V. JUSTICE CARDOZO'S ALTERNATIVE STANDARD

In addition to the deep roots test, the Supreme Court has used another standard to identify unenumerated rights. It originates from *Palko v. Connecticut*, in which Justice Cardozo wrote that guarantees contained in the Bill of Rights apply against the states if they are "implicit in the concept of ordered liberty," such that neither

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[142] Loving v. Virginia, 388 U.S. 1 (1967).
[143] Griswold v. Connecticut, 381 U.S. 479 (1965).
[144] Roe v. Wade, 410 U.S. 113 (1973); Coles, *supra* note 84, at 43.
[145] McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 415 (1819) (Marshall, C.J.) (noting that the Constitution was "*intended* to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs") (first emphasis added); J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 785 (1971).
[146] THE FEDERALIST NO. 14 (Madison).

"liberty nor justice would exist if they were sacrificed."[147] Although *Palko* was an incorporation case,[148] Justice Cardozo's standard has been used in the substantive due process context before.[149] However, it has largely fallen into desuetude lately. A recent survey of circuit court decisions shows that the deep roots test is almost invariably used to decide substantive due process cases.[150]

Assuming courts should engage in substantive due process judicial review in the first place,[151] for the reasons discussed below, Justice Cardozo's test is much better than the deep roots test. But this does not mean that courts should pay no attention to history. Even when using Cardozo's standard, courts would do well to refer to history and tradition as a starting point (at least to the extent that our traditions can be ascertained).[152] Nevertheless, if there is adequate reason to depart from tradition, departure should occur.

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[147] Palko v. Connecticut, 302 U.S. 319, 325–26 (1937). There is no special reason that Justice Cardozo's formulation is the necessary standard. I merely propose it because of its open-ended language. So, Lord Coke's standard, which would invalidate laws that violate "common right and reason" would likely function similarly. *See* Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (1610); Charles B. Blackmar, Essay, *Neutral Principles and Substantive Due Process*, 35 ST. LOUIS U. L.J. 511, 511–14 (1991); Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 51–52 (1926).

[148] The precise issue in *Palko* was whether the double jeopardy clause of the Fifth Amendment should be incorporated to the states. The Court held that it should not, because the right is not "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 319. Although *Palko*'s holding was overturned in *Benton v. Maryland*, 395 U.S. 784 (1969), the analytical framework remained intact.

[149] *See Roe*, 410 U.S. at 152 ("[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy.") (citation omitted); *see also* Compassion in Dying v. Washington, 79 F.3d 790, 803 (9th Cir. 1996) (recognizing Cardozo's test as a standard that had been used in substantive due process cases).

[150] Hawkins, *supra* note 23, at 412 ("Far and away, the most commonly utilized element of the *Glucksberg* Doctrine is the History and Tradition Inquiry.").

[151] I understand that this is a contestable assumption. *See, e.g.*, Troxel v. Granville, 30 U.S. 57, 80 (2000) (Thomas, J., concurring) (suggesting that substantive due process is inconsistent with the original understanding of the Fourteenth Amendment). However, I do not want to become distracted from the main point of this article, which is to determine the best substantive due process test, rather than whether substantive due process is a legitimate constitutional doctrine.

[152] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–4, 7–11 (1996).

A. JUSTICE CARDOZO'S STANDARD PROMOTES CANDOR AND TRANSPARENCY

Importantly, Justice Cardozo's standard has the benefit of candor, which should not be understated, given the typical opacity of judicial opinions.[153] By using such an abstract standard, judges would have to be upfront about what is driving their decisions; there would be no question that they are giving content to the Constitution's "deliberately capacious language"[154] by reference to moral or political judgment. To borrow from Ronald Dworkin, this is what judges should be doing.[155] If the Constitution's text, structure and precedents leave a judge free to choose between two different results, the judge ought to choose the one that is more ethically defensible.[156]

Judges using Cardozo's standard would not be able to cloak their value judgments under the claim that their decisions are dictated by "tradition" and "historical practice." Under the deep roots framework, judges act as pseudo-historians, searching for the traditions and historical practices that will legitimate their preconceived ethical notions.[157] But under Cardozo's more abstract standard, judges would be forced to provide a meaningful normative defense of the positions they take. They would have to explain why the recognition or non-recognition of an asserted liberty interest furthers ordered liberty and justice. As a result, Cardozo's standard would require judges to engage in an open debate about good governance, which is, in a fundamental sense, what constitutional law is all about. Using Cardozo's standard, judges would not be able to defer

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[153] *See* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1975, 1990–94, 2012–17 (1990) (arguing that cloaking political judgments under legal terminology has been a major problem for the judiciary and has had the result of systematically disadvantaging racial minorities).

[154] Michael H. v. Gerald D., 491 U.S. 110, 140 (1989) (Brennan, J., dissenting).

[155] *See* DWORKIN, *supra* note 152.

[156] *See id.*

[157] *See supra* Part II.A.

blame for unjust decisions to Blackstone or Lord Coke.[158] Instead, judicial decisions would stand or fall on the cogency of the justifications on which they rest.

Of course, judges' opinions will inevitably differ on the morality or immorality of particular decisions. Over time, however, a dialogue which focuses on whether judicial decisions promote social justice will serve the nation better than a dialogue which merely looks to what was said or done in the past.[159] That is, basic fairness is more likely to find its way into judicial opinions if normative defensibility—as opposed to historical investigation—is the touchstone.

B. RIGHTS AS TRUMPS

Justice Cardozo's standard does not determine which rights the Constitution protects on the basis of collective power. Under Cardozo's framework, rights would operate as checks on public power, thereby reinvigorating the ideal of individual liberty currently absent from substantive due process cases. Empirical studies show that in cases where the deep roots test is used, courts almost never protect the asserted liberty interests.[160] Civil libertarians therefore have good reason to view the deep roots test with skepticism.

Conversely, in the Supreme Court's cases where Justice Cardozo's standard—or a comparably open-ended one—was used, courts have been less reluctant to expand the realm of individual liberty. In *Lawrence*, for example, the Court recognized the right of homosexuals to engage in intimate conduct,[161] though historical support for the asserted claim was sparse.[162] And in *Loving v. Virginia*, the Court invalidated a state law banning interracial marriage,[163] despite

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[158] *See* Washington. v. Glucksberg, 521 U.S. 702, 711–12 (1997) (citing Blackstone, de Bracton, and Coke to support the conclusion that the right to physician-assisted suicide is not constitutionally protected).
[159] DWORKIN, *supra* note 152, at 4. Marshall, *supra* note 136, at 1–5; *see* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 518 (1981).
[160] Hawkins, *supra* note 23, at 412.
[161] *See* Lawrence v. Texas, 539 U.S. 558 (2003).
[162] *See* Sunstein, *supra* note 139, at 378–79 (2006).
[163] Loving v. Virginia, 388 U.S. 1 (1967).

historical disapproval of miscegenation.[164] Although *Loving* is usually taught as an Equal Protection case, the Court took care to invalidate the law on substantive due process grounds as well.[165] In both of these cases, the Court used a Justice Cardozo–type standard, and in both it expanded the realm of personal autonomy.

Concededly, Justice Cardozo's test does not square perfectly with principles of majoritarian self-government; that is, it does not avoid Alexander Bickel's counter-majoritarian difficulty.[166] But the counter-majoritarian point is specious because it assumes that majoritarianism is the constitutional baseline and that any deviations from it must be defended. As a descriptive matter, this point fails to capture the true nature of American government. Our Constitution does not prescribe pure majoritarianism. It removes a number of issues from the public sphere and places them in the realm of individual decision making.[167] While not particularly serving democratic values, Justice Cardozo's standard functions to protect

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[164] Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause*, 44 B.C. L. REV. 177, 187 (2002); Coles, *supra* note 84, at 43 (2005) ("Needless to say, there was no American 'history and tradition' of allowing interracial marriage.").

[165] *See Loving*, 388 U.S. at 11 ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); Coles, *supra* note 84, at 43.

[166] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (2d ed., 1986). Bickel famously argued that when judges strike down democratically passed statutes for being inconsistent with the Constitution, they act in a way that is counter-majoritarian. *Id.*; *see* Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 66 (2008) (discussing the counter-majoritarian difficulty). For a novel argument that judicial review promotes—rather than inhibits—popular sovereignty, see David Law, *A Theory of Judicial Power and Review*, 97 GEO. L.J. 723 (2009). *See also* Keith Whittington, *Judicial Review of Congress before the Civil War*, 97 GEO. L.J. (forthcoming June 2009) ("The Supreme Court has often used the power of judicial review to advance rather than to obstruct the political projects of political leaders.").

[167] *See* Bork, *supra* note 115 at 2–3; *see also* Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11, 15, 22 (1973) (arguing that the Court's substantive due process cases reserve a number of issues to the realm of personal decision making).

individual liberty in a way that the deep roots test—which defines rights in terms of collective power[168]—does not.

Of course, it is a contingent fact that Cardozo's test protects a more expansive set of individual rights than does the deep roots test. In theory, we could experience a conservative era, in which reliance on tradition might operate to protect a more expansive concept of individual freedom.[169] But this theoretical possibility is unlikely to happen.[170] It is generally agreed that Cardozo's standard is friendlier to individual liberty than is the deep roots test—whose adoption has resulted in a systematic subordination of individual freedom to public power.[171] The general trajectory of open-textured constitutional standards has been to expand notions of freedom and equality—not restrict them.

C. MORAL PROGRESS FACILITATED

Because Justice Cardozo's standard does not appeal to history and tradition to define the range of constitutional rights, it is not likely to obstruct moral progress in the way the deep roots test is. Under Cardozo's framework, the dialogue would focus on the ethical legitimacy of courts' decisions—not on whether they find support in the dusty annals of history. If the rationale underlying a certain rule of law has evaporated, then Cardozo's standard would instruct judges to consider setting that rule aside.[172] And if, after careful deliberation, the court firmly believed that the rule has no place in modern society, then it should strike it down. Habit and familiarity are unsatisfactory reasons for maintaining archaic rules.[173] Laws must be sustainable as a matter of fundamental fairness.

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[168] *See supra* Part IV.A.
[169] *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 647 (1994) (arguing that one of the reasons Burke favored slow reform was that change is not always progress).
[170] *See* Marshall, *supra* note 136, at 1–5; Coles, *supra* note 84, at 43.
[171] *See* Conkle, *supra* note 27, at 63; Hawkins, *supra* note 23, at 412.
[172] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
[173] Baze v. Rees, 128 S. Ct. 1520, 1546 (2008) (Stevens, J., concurring) (arguing that the death penalty has only been preserved through "habit and inattention").

On the other hand, as recognized in *Lawrence*, tradition and history should be used as a starting point for a court's substantive due process inquiry,[174] and there ought to be a mild presumption favoring long-established historical practices. Accordingly, those seeking change ought to shoulder the burden of persuasion as to why reform is appropriate. This presumption serves the values of stability and predictability,[175] and also helps to ensure that those touting false progress do not prevail. At the same time, because only a mild presumption in favor of tradition is prescribed, valid claims of moral progress ought to have a decent chance of carrying the day. Although stability is important, stagnancy needs to be avoided. Of course, separating false claims of progress from true ones is difficult. But the alternative is blind perpetuation of the "prejudices and superstitions of a time long past."[176] In distinguishing real claims of progress from false ones, judges are advised to rely on experience, reason, and a certain degree of modesty and respect for their role in our constitutional system.[177]

In sum, adopting Cardozo's standard, with the foregoing refinements, will promote judicial transparency, individual liberty, and normative progress.

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[174] Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

[175] *See* Helvering v. Hallock, 309 U.S. 106, 119, 121 (1940) (stating

> [w]e recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. . . . This Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction.) (citation omitted.)

[176] Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

[177] *See* Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting); STEPHEN BREYER, ACTIVE LIBERTY 5–8 (2005); *see generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

CONCLUSION

This article has endeavored to demonstrate that the deep roots test is a fundamentally flawed substantive due process standard. It also briefly discussed Justice Cardozo's test as a potential alternative. For several reasons, the deep roots test should be reconsidered. First, it does not serve the principal rationale for its adoption—limiting judicial discretion. Under the deep roots framework, courts have vast discretion in picking which traditions to use in the analysis, in choosing how to characterize the tradition at issue, and in ultimately deciding whether an asserted liberty interest should receive modern protection once it is deemed to be supported by history. Viewed together, these points show that courts using the deep roots test have virtually unfettered discretion in determining which rights should receive constitutional protection.

The deep roots test should also be reconsidered because it suffers from theoretical flaws. This article established that using the test amounts to defining rights on the basis of the collective will, which is contrary to the basic principle that rights are checks on public power. Furthermore, it showed that tradition-based jurisprudence is at odds with moral progress. The Supreme Court should therefore abandon the deep roots test and adopt a standard that is in keeping with our constitutional ideals of individual freedom and limited government.